

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division

ROBERT J. COLLIER,

Plaintiff,

v.

LAND & SEA RESTAURANT COMPANY,
LLC d/b/a FRANKIE ROWLAND'S
STEAKHOUSE

Case No.: 7:13-cv-104

Defendant/Third Party Plaintiff,

v.

PERFORMANCE FOOD GROUP, INC.
d/b/a PERFORMANCE FOOD SERVICE –
VIRGINIA,

Third Party Defendant/Fourth Party Plaintiff,

v.

SAM RUST SEAFOOD, INC.

Fourth Party Defendant/Fifth Party Plaintiff,

v.

CAPE COD SHELLFISH & SEAFOOD COMPANY,

Fifth Party Defendant/Sixth Party Plaintiff,

v.

NORM BLOOM AND SON, LLC,

Sixth Party Defendant.

**ANSWER OF FOURTH PARTY DEFENDANT/FIFTH PARTY PLAINTIFF SAM RUST
SEAFOOD, INC. TO THE SECOND AMENDED THIRD PARTY COMPLAINT OF
LAND & SEA RESTAURANT COMPANY, LLC
d/b/a FRANKIE ROWLAND'S STEAKHOUSE**

Fourth Party Defendant/Fifth Party Plaintiff Sam Rust Seafood, Inc. (Sam Rust) states the following as its Answer to the Second Amended Third Party Complaint of Land & Sea Restaurant Company, LLC d/b/a Frankie Rowland's Steakhouse (Land & Sea):

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted.
7. Admitted.
8. Denied as stated. Land & Sea's employees were unable to identify definitively the shipments of products that Plaintiff consumed on April 14, 2011.
9. Denied as stated. Land & Sea's employees were unable to identify definitively the shipment of Sam Rust's products that Plaintiff consumed on April 14, 2011.
10. Denied for lack of knowledge or information.
11. Admitted.
- 12-35. These Paragraphs are allegations not directed at Sam Rust and therefore require no response from Sam Rust. To the extent that a response is required, Sam Rust denies any negligence, breach of warranty or any obligation to any other party in this matter.

36. Sam Rust incorporates by reference its answers to Paragraphs 1-11 above.
37. Admitted that Land & Sea seeks a declaration; denied that Land & Sea is entitled to a declaration that Sam Rust must defend and indemnify Land & Sea against Plaintiff's claims.
38. Admitted.
39. Admitted that the Agreement contains the language quoted in Paragraph 39; denied that the language quoted in Paragraph 39 constitutes the entire relevant part of the Agreement.
40. Denied that Land & Sea is entitled to defense or indemnity under all of the terms of the Agreement and applicable law.
41. Admitted.
42. Admitted.
43. Denied. In ECF Documents 58 and 66, and the attached exhibits, Sam Rust stated in detail the reasons that Land & Sea is not entitled to defense or indemnity.
44. Denied for lack of knowledge and information regarding the interpretation by Land & Sea of the positions of Sam Rust; admitted that Sam Rust denies that Land & Sea is entitled to defense or indemnity.
45. Admitted that Sam Rust has rejected expressly the demand of Land & Sea for defense and indemnity; admitted that there is an actual case or controversy between Land & Sea and Sam Rust.
46. This Paragraph is a claim not directed at Sam Rust and therefore requires no response from Sam Rust. To the extent that a response is required, Sam Rust denies any negligence, breach of warranty or any obligation to any other party in this matter.
47. Denied.

48. Denied that Land & Sea is entitled to trial by jury of its claim for a declaration of its rights under the Agreement and against Sam Rust.

AFFIRMATIVE DEFENSES

1. Land & Sea was put on notice of Plaintiff's claim and hospitalization on or about April 15, 2011. Land & Sea failed to secure the preservation of critical evidence, including, among other things, physical samples drawn from Plaintiff, the remaining portions of all food products served to Plaintiff and the condition of the restaurant immediately following the service of the meal to Plaintiff, and has thereby allowed the spoliation of this critical evidence, severely prejudicing the defense of Sam Rust.

2. Exhibit 2 to this Second Amended Third Party Complaint demands defense and indemnity under a provision of the Uniform Commercial Code, VA Code §8.2-607. Under the plain language of that Code section, Land & Sea was obligated to provide Sam Rust notice of Plaintiff's claim "within a reasonable time". As a matter of law, Land & Sea has failed to provide Sam Rust with notice "within a reasonable time" and, as a result, is "barred from any remedy" against Sam Rust, in accordance with the terms of the statute cited by counsel for Land & Sea in Exhibit 2.

PRAYER FOR RELIEF

For the reasons stated above, Sam Rust prays for the entry of an order dismissing with prejudice the Second Amended Third Party Complaint and all other relief to which Sam Rust may be entitled including but not limited to, taxable costs as allowed by applicable law.

SAM RUST SEAFOOD, INC.

By: /s/ C. Jay Robbins, IV
Of Counsel

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CERTIFICATE

I hereby certify that on September 03, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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I further certify that on September 03, 2014, courtesy copies of the foregoing were sent first-class mail, postage prepaid to the following:

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